Quite apart from that, I had also held that the plaintiff's claim is defeated by the six-year limitation provision in s. 6 of the Limitation Act 1953 as although the release of the money was on 27 October 1986, the first demand made by the plaintiff was only on 15 April 1993 and the action was filed only on 24 June 1993. Since it is my opinion that this did not involve trust property, the contention of the plaintiff that s. 22 of that same Act applies, namely that no period of limitation is prescribed for trust property, cannot hold water.

In these circumstances, I had granted the order in terms of the defendants' application to strike out the plaintiff's claim with costs.

**SUPPULETCHIMI A/P KARPAYA**

**v.**

**PALMCO BINA SDN. BHD.**

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CIVIL SUIT NO. 22-384-93]
2 MARCH 1994

***PRACTICE & PROCEDURE: Application to strike out writ - Order 18 r. 19(1) Rules of the High Court 1980 - Reasonable ground for proceeding with action - Determination - Whether subject to optimum evaluation approach.***

***PRACTICE & PROCEDURE: Application to strike out writ - Order 18 r. 19(1) - Inadmissibility of affidavit evidence - Rule 19(2) - Whether application thereof absolute.***

***PRACTICE & PROCEDURE: Inherent powers of Court to make order - Order 92 r. 4 - Whether overriding in effect.***

This was an application by the defendant under O. 18 r. 19(1) Rules of the High Court 1980 to strike out the statement of claim of the plaintiff on the grounds, *inter alia*, that the claim disclosed no reasonable cause of action.

The defendant were building contractors who undertook to develop a piece of land in Sungai Ara, Penang, into a housing estate. At the material time the said land was partly occupied by licensed occupiers and arrangement was thus made between the defendant and the said occupiers whereby the defendant would compensate the said occupiers by providing them a new house free of charge on the latter demolishing their houses and vacating the said land. In consequence thereof, one Muniandy, as licensed occupier of house no.107 thereon, was made entitled to a free double storey detached house on his undertaking to demolish house No. 107 together with "all buildings and structures appurtenant or appertaining to the said house". An agreement to this effect was executed on 9 July 1993 between the defendant and a representative of Muniandy.

Standing next and juxtaposed to house No. 107 was a living structure known as no. TI 866. The plaintiff, who was the wife of Muniandy, claimed to be the equitable occupier of this structure and contended that since it was a house by itself seperate and disjunct from house No. 107, it was not therefore subject to demolition under the

agreement of 9 July 1993. The defendant submitted that in essence the plaintiff's claim was only an attempt to secure further compensation from the defendant over and above what her husband was entitled to and her claim was therefore vexatious as well as frivolous and ought to be struck out.

**Held:**

**[1]** The statement of law that in an application under O. 18 r. 19(1)(a) Rules of the High Court 1980, the only issue for determination is whether the pleading on the face of it discloses a reasonable cause of action and that averments in affidavit should be disregarded or given little consideration is not of absolute application. This position in law only governs if the Court does not decide to invoke its inherent jurisdiction under O. 92 r. 4 of the said Rules. As such even in an application under O. 18 r. 19(1)(a), the Court would still be entitled, in its inherent jurisdiction, to look at and decide upon the contents of the affidavits. And it follows further that even when the pleading is in order, the Court may still look at the history of the matter as disclosed by the affidavits, and if, in the light of that history, the action is found to be vexatious, the pleading could still be struck out and the action dismissed.

**[2]** In dealing with applications under O. 18 r. 19(1) of the RHC the minimum evaluation approach of affidavit evidence in the past ought now to give way to the optimum evaluation approach. Hence the question to be determined is not simply whether the pleading or indorsement on the face of it discloses a reasonable cause of action. The crucial question to ask is whether the pieces of evidence essential to make out a reasonable *prima facie* cause of action are of such a nature that they are adduceable by affidavit evidence and if so, whether such essential *prima facie* evidence had been so adduced in the supporting affidavits. Such affidavits however must condescend into particulars for serious arguments such that they are sufficient to satisfy the Court that there is a reasonable *prima facie* cause of action.

**[3]** In the present case there should be sufficient evidence in the affidavits of the plaintiff read with her statement of claim to show that the latter is at least cloathed with a reasonable *prima facie* cause of action against the defendant. The plaintiff has clearly failed to disclose such *prima facie* case. Beside the fact that she was not a licensed occupier of structure no. TI 866 or any other building thereabout, she failed to produce any evidence to support her claim to equitable interest. On the balance of probability she also failed to show why structure no. TI 866 should not be considered part of house No. 107 which was occupied by her husband in view of the close juxtaposition of the two structures.

**[4]** The affidavits of the plaintiff, not only by what they say but by what they do not say, showed that the plaintiff has no reasonable ground for proceeding with this action. The claim was without firm basis and incapable of proof and amounted to an abuse of the procedure. It was indeed a despicable attempt by the wife to secure double compensation on what her husband was to receive from the defendant and nothing more.

*[Plaintiff's statement of claim struck out].*

**Cases referred to:**

*New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. [1985] 1 MLJ 226* ***(refd)***

*Raja Zainal Abidin bin Raja Haji Tachik & Ors. v. British-American Life & General Insurance Bhd. [1993] 3 MLJ 16* ***(refd)***

*United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd. [1968] 2 MLJ 85* ***(refd)***

*Re ABZ (An Infant) [1992] 2 SLR 442* ***(refd)***

*Bright Navigation Co. Ltd. v. 'Eishen Maru' [1988] 1 CLJ 589 / [1988] 1 MLJ 482* ***(refd)***

*Uni-Navigation Pte. Ltd. v. Wei Loong Shipping Pte. Ltd. [1993] 1 SLR 876* ***(refd)***

*Re Singapore Souvenir Industry Pte. Ltd. [1986] 1 MLJ 14* ***(refd)***

*Loo Chay Meng v. Ong Cheng Hoe [1990] 1 MLJ 445* ***(refd)***

*Hongkong and Shanghai Banking Corp. v. Goh Su Liat; TAS of Singapore [1986] 2 MLJ 86* ***(refd)***

*Low Fong Mei v. Koh Teck Siang [1989] 2 CLJ 694 / [1989] 3 MLJ 149* ***(refd)***

*Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd. [1992] 4 CLJ 1922 / [1992] 2 MLJ 434* ***(refd)***

*Khaw Kok Sin v. Khaw Gim Leong Co. Sdn. Bhd. [1974] 1 MLJ 180* ***(refd)***

*Pacific Centre Sdn. Bhd. v. United Engineers (M'sia) Bhd. [1984] 2 CLJ 56 / [1984] 2 MLJ 143* ***(refd)***

*Motor Emporium v. Arumugam [1933] 2 MLJ 276* ***(refd)***

*Heng Joo See v. Ho Pol Ling (Divorce Petition No. 94 of 1993) (unreported)* ***(refd)***

*Re Vernazza [1959] 1 WLR 622; [1959] 2 All ER 200* ***(refd)***

*Tractors Malaysia Berhad v. Tio Chee Hing [1975] 2 MLJ 1* ***(refd)***

*Pertama Malaysia Finance Berhad v. Konrep Services Sdn. Bhd. & 3 Ors. [1990] 1 CLJ 127* ***(refd)***
*Saw v. Hakim [1888] 5 TLR 72* ***(refd)***
*Chang Siew @ Chang Siew Kee & Ors. v. Chang Sang @ Chen Yen Sang & Anor. [1993] 1 CLJ 125* ***(refd)***
*Jacobs v. Booth's Distillery Co. [1901] 85 LT 262* ***(cit***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 68(2)
Local Government Act 1976
Rules of the High Court 1980, O. 14, O. 18 r. 19(1)(a), (b), (c), (d) (2), O. 28 r. 4, O. 33 r. 2, O. 34 r. 8, O. 92 r. 4

**Other sources referred to:**
**The Inherent Jurisdiction of the Court,** Jack Jacob, (1970) CLP 23

*For the plaintiff - Habib Rahman bin Seeni Mohideen; M/s. Mohideen & Partners*
*For the defendant - Gerard Chan Weng Yew; M/s. Lim Kean Siew & Co.*

## JUDGMENT

**Vincent Ng Kim Khoay J:**
The defendant applied by way of a summons-in-chambers (Enclosure 8) for:

(i) The injunction (Encl. 5) dated 6 October 1993 restraining the defendant from demolishing a structure known as No. T1 866, Sungai Ara, 11900, Pulau Pinang to be set aside;
(ii) The writ of summons dated 6 October 1993 (Encl. 1) to be struck off under O. 18 r. 19(1)(a) or (b) or (c) of the Rules of the High Court 1980 (RHC);
(iii) Damages consequential upon the implementation of the said injunction, to be assessed by the SAR, and
(iv) Costs of the action.

The defendant's case is as follows:

The defendant are building contractors who have entered into a joint venture agreement with Sg. Ara Holdings Sdn. Bhd. to develop a large area of land which encompasses an area in which the plaintiff resides with several others.

After entering into the joint-venture agreement the defendant, acting in concert with Sg. Ara Sendirian Berhad, agreed to give compensation to the genuine licensed occupiers of the land, whereby Sg. Ara was to sell the land at fixed rates and the defendant to build houses of certain specifications free of charge for such occupiers.

In order to find out who were the legitimate licensed occupiers, a census was held in 1984 ("the said census").

According to the census record of licensees occupying the large area of land as at 20 December 1984 was *inter-alia*, a house no. 107 Block E, Mukim 12 Sungei Ara, 11900 Pulau Pinang (said house no.107) occupied by one named Muniandy a/l Pavadi (Muniandy) who held a license No. D3/41 issued by Sg. Ara Holdings Berhad. Staying with Muniandy at the time of the census, were 10 other family members including the plaintiff who was the wife of Muniandy, and Muniandy's two other brothers namely Tharumalingam a/l Pavadai, (Tharumalingam) and Ganapathy a/l Pavadai (Ganapathy). The details of the 11 occupiers and their relationship to Muniandy recorded in the census were as follows:

| No. | Name | I/C No. | Sex | Marital Status | Age | Relation | Occupation |
|---|---|---|---|---|---|---|---|
| 1. | Muniandy a/p Pavadai | 1346178 | M | M | 7/1/47 | Licensee | Labourer |
| 2. | Suppuletchmi a/p Karpaya | 4096621 | F | M | 8/7/57 | Wife | - |
| 3. | Mazraviran a/l Krishnan | 5230057 | M | S | 12/9/57 | Brother-in-law | Labourer |
| 4. | Moganambal a/l Muniandy | BCD 650750 | F | - | 19/4/78 | daughter | - |
| 5. | Thyagarajan Pillay a/l Muniandy | BC C531401 | M | - | 9/4/74 | Son | - |
| 6. | Vijaya-Letchumy a/p Muniandy | BC D165239 | M | - | 21/6/76 | daughter | - |
| 7. | Ganapathy a/l Pavadai | 4240281 | M | M | 26/2/52 | Brother | - |
| 8. | Raja Mani a/p Vaithanianathan | 5336740 | F | M | 18/5/57 | Sister-in-law | - |
| 9. | Tharumalingam a/l Pavadai | T. 126444 | M | M | 2/11/48 | Brother | Army |
| 10. | Muniammal a/p Muthuvelu | 4888289 | F | M | 5/8/55 | Sister-in-law | - |
| 11. | Linggam | BC E500616 | M | - | 20/7/79 | - | - |

On 23 October 1991 the defendant received a letter of even date from Muniandy, plaintiff's husband and Ganapathy which confirmed that both of them had surrendered all their rights in respect of house no.107 to their mutual brother Tharumalingam. Consequently upon and pursuant to the said letter the defendant reached an agreement with Tharumalingam on

compensation - which was subsequently reduced into writing vide a detailed written agreement dated 17 June 1993 ("said agreement") - wherein it was agreed that the house no.107 was to be pulled down and demolished at the latter's cost **"Together with all buildings and structures (if any) appurtenant or appertaining to"** the said house no.107, and the defendant was to compensate Tharmalingam by constructing for him free of charge, a double storey detached house according to plans as detailed in the said agreement. Another agreement was then also simultaneously executed between Tharumalingam and Sg. Ara Holdings Sendirian Berhad in which the relevant land whereupon the said house was to be erected was sold to the former at RM2.00 per sq. ft.

The letter dated 23 October 1991 from the two brothers namely Muniandy and Ganapathy (exhibit "WPS 2" of Encl. 6) and the defendant's letter to Tharumalingam dated 9 June 1993 (exhibit "WPS 3" of Encl.6) read as follows:

Muniandy a/l Pavadai
Ganapathy a/l Pavadai
107, Block E, Mk 12
Sungai Ara
Penang
23 October 1991

M/s. Palmco Bina Sdn. Bhd.
10 Lebuh Bishop
Penang

2. Sungai Ara Holdings Sdn. Bhd.

Dear Sirs,

Re: Desaria-Sungai Ara, Penang House No.107, Block E, Mk 12, Sungai Ara, Penang

We refer to the above matter and write to confirm that you are authorised to negotiate with our brother Tharumalingam a/l Pavadai (I.C. 0964386) in respect of any compensation with regard to the above.

Further, we also confirm that any compensation awarded by you for demolishing of the above property shall solely belong to our brother Tharumalingam a/l Pavadai and we have no objection whatsoever in you entering into any compensation agreement solely with our said brother.

We hereby confirm that we have relinquished all our rights, title and interest in the above house in favour of our brother Tharumalingam a/l Pavadai and we have no more claim of whatsoever nature in respect of the said house.

We hereby agree to indemnify you at all times against all actions, claims, suits that may arise against you as a result of you entering into any compensation agreement solely with the said Tharumalingan a/l Pavadai.

Yours faithfully,

| | |
|---|---|
| Sgd. | Sgd |
| Muniandy | Ganapathy |
| a/l Pavadai | a/l Pavadai |
| I.C. 1346178 | I.C 4240281 |

| | |
|---|---|
| Sgd. | Sgd |
| Witness | Tuan Ibrahim |
| M.I. Meerasa, PJM | Witness |
| Taman Abidin | I.C 4563738 |
| Block-E, G-6, | |
| Jalan Perak | Di hadapan saya |
| Pulau Pinang | sgd. N.R Sundram |
| Tel: 212006 | Pesuruhjaya Sumpah |
| | (Commissioner for Oaths) |

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9 June 1993

Mr. Tharumalingam a/l Pavadai
107 Block E
Mukim 12
Sungei Ara
11900 Penang

Dear Sir

Desaria, Sungei Ara (Penang) House No.107 Block E, Mukim 12, Sungei Ara, Penang.

We write to inform you that your temporary accommodation is ready for occupation.

We earnestly request you to make the necessary preparation to move into the temporary house provided to you as soon as possible and deliver to us vacant possession of the land which your present house No.107, Block E, Mukim 12, Sungei Ara, Penang is sited.

As per our various discussions, we are to confirm

1. Resettlement House

You wlll be provided with a double-storey detached house with 4 rooms. The land area is approximately 4,000 sq.ft. You need only to pay for the land at RM2 per square foot to the landowner, Sungei Ara Holdings Sdn. Bhd.

2. Transitional House

House No.205 Block E, Mukim 12, Sungei Ara, Penang is now available for your temporary accommodation.

3. Stay at Temporary House

Your permanent resettlement house is being planned to be completed towards the end of 1995.

4. Subsidy of Electricity and Water Comsumption

While you are being temporarily accommodated at our transitional house, we shall pay for your electricity and water consumption to a maximum of RM50 per month. Any consumption over and above will be on your account.

5. Installation of Telephone Services

Should you require any telephone service, you will have to apply directly to the Authority and all expenses are on your account.

6. Demolition of Existing House

After you have moved to the temporary house, you are required to demolish house No.107 (and also any other structures) within 14 days and hand over the site to us with vacant possession

7. Assistance

If you should need any assistance from us in moving to the said house, we request that you give us some notice.

We look forward to your co-operation and we thank you very much in advance.

Yours faithfully

Palmco Bina Sdn. Bhd.

Sgd.
Wong Pak Sun
General Manager

c.c. The Managing Director
Sungei Ara Holdings Sdn.Bhd.

c.c. Lim Kean Siew & Co.
(Attention: Ms. Pamela Ong)

After the said Tharumalingam had received the letter dated 9 June 93 from the defendant and after having secured the said agreement for the construction by the defendant of a double storey detached 6 bedrooms house in his favour, he wrote a letter dated 9 July 93 to the defendant to notify that he was not the owner of structure no. 866 which, he said, belonged to the plaintiff. It is not without significance that he did not then disclose that the plaintiff was his sister-in-law and the wife of his brother Muniandy, the occupation-licence holder (who in turn had transferred his rights as a licencee to Tharumalingam).

Under clause 2 of the said agreement, Tharumalingam had, in consideration of a double storey detached house being erected free of charge for him, agreed to pull down, demolish and remove from the defendant's land the said house No. 107 **and all buildings and structures (if any) appurtenant or appertaining to** the said house no. 107.

The pith and crux of the defendant's contention is as follows:

(a) Tharumalingam's undertaking in the said agreement "to demolish ... the buildings and structures appurtenant or appertaining to" House No.107 should be construed to include structure no. TI 866, as "appertaining to" in "Words & Phrases Legally Defined" by John B.Saunders is defined as 'belonging to';

(b) the initials TI in "TI 866" and N/T in "N/T 107" in the assessment bill (PI in Encl. 2) meant respectively 'transcient' and 'next to' and therefore structure No. 866 was merely a structure dependant on the existence of house No. 107;

(c) the plaintiff, her husband Muniandy, had stayed in house No. 107 and certain structures including structure No. 866 were part of the appurtenants of house No. 107. It is of significance that the earliest assessment bills for structure No. 866 exhibited as "P1" in Encl. 2 was for year of assessment 1984 which was the year when the 1984 census was taken, and during which period the plaintiff would have got wind of possible provision of compensation by the landowners. Indeed, the plaintiff had disclosed in para 3 of her affidavit (Encl. 2) that she and her family were informed by "Tuan Watts dan anak Tuan Brown" that they would be relocated in Sungei Ara.

(d) it is highly incredible for the husband Muniandy and the plaintiff Suppuletchimi a/p Karpaya to live separately in Structure No. 866 and house No. 107, there being no averment or suggestion that they were separated or divorced.

(e) it is also very improbable that the results of the census completed many years upon

which the plaintiff's brother-in-law had benefitted, were unknown to the plaintiff and her husband and no steps were not taken to dispute same.

The common ground or undisputed facts are as follows:

(a) The plaintiff never paid for or held a land occupation licence, such as the licence to occupy no. D 3/41 held by her husband Muniandy in respect of house No. 107.
(b) The plaintiff was the wife of Muniandy who had paid for and held the said licence no. D 3/41.
(c) The occupants of house no. 107 and premises no. 866 were all the relatives of Muniandy.
(d) The plaintiff had paid the assessment for structure no. TI no. 866 Block E Mukim 12 Sg. Ara (N/T 107 Block E Mukim 12) since 9 August 1984.
(e) Tharumalingam a/l Pavadai was the brother of the plaintiff's husband Muniandy a/l Pavadai (holder of licence no. D 3/41) who (Tharumalingam) had executed the said agreement which obliged him to "pull down, demolish and remove (House No. 107) **and all buildings, structures (if any) appurtenant or appertaining to"** house no. 107.

For the above reasons, the defendant submit that the plaintiff's claim was vexatious, frivolous and an abuse of Court process for being an attempt to secure the building of a further unit of double storey detached house free of charge from the defendant over and above what her husband Muniandy was entitled to.

The plaintiff's case is as follows:

(a) They denied the contents of the said census and the particulars therein.
(b) They said the structure No. 866 was a separate house which was handed down to the plaintiff from her granduncle (not named) whereas house no. 107 was handed down to Muniandy from the latter's parents.
(c) Structure no. 866 was in fact house no. TI 866 Block E, Mukim 12, Sg. Ara and is not part of or a structure appurtenant or appertaining to premises No. 107. It was thus a separate independant unit bearing a separate registered address.
(d) The plaintiff had paid a separate assessment rate in respect of premises no. TI 866 vide Penang City Council assessment notices, three of which were exhibited as "P-1" of enclosure 2.
(e) The plaintiff's granduncle had constructed premises no. TI 866 at his own cost and with the verbal approval and promise in favour of permanent occupation of the then owner of land; and the plaintiff has been staying therein with her family since 1946.

The plaintiff thereby asserted that for reasons aforesaid, she had equitable rights over the land and structure no. TI 866.

Be it noted that the plaintiff had filed her statement of claim on 10 January 94, and only after the application dated 6 October 1993 for striking off had been filed by the defendant.

The proper issue to consider first in this application is prayer (ii) above, due to its decisive effect on prayer (i).

Prayer (ii) sought to have the writ of summons dated 6 October 1993 struck off under O. 18 r. 19 (1)(a) or (b) or (c) of the RHC; so framed in the alternative rather than e.g. under (a) alone, presumably in part because it is often submitted that by virtue of O. 18 r. 19(2), averments in affidavits should be disregarded or given little consideration in applications made under O. 18 r. 19(1)(a) of RHC, as the only **issue for determination in such applications, should be whether the pleading or endorsement on the face of it discloses a reasonable cause of action or defence as the case may be.** See *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 MLJ 226. See also *Raja Zainal Abidin bin Haji Tachik & Ors. v. British American Life & General Insurance Bhd.* [1993] 3 MLJ 16. This statement of law is not of absolute application - it is not entirely correct - as in my considered opinion, this position in law governs only if the Court does not decide to invoke its inherent jurisdiction under O. 92 r. 4.

Even though O. 18 r. 19(2) provides that "no evidence shall be admissible on an application under paragraph (1)(a), yet O. 92 r. 4 states that "**nothing in these rules** shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court." Clearly O. 92 r. 4

would appear to override r. 19(2). However, such a construction may not be necessary as in my opinion O. 92 r. 4 could be triggered into action only when the Court, upon reading the affidavits, decides to exercise its inherent powers.

As such, even in an application under Ord 18 r. 19(1)(a), the Court would still be entitled, in its inherent jurisdiction, to look at and decide upon the contents of the affidavits. By the time that such applications come up for hearing, the parties would have had ample opportunities to cure by amendments any shortfalls in drafting the pleadings, and the application for striking off would necessarily be based on the amended pleadings. It does not preclude the Court from studying the affidavits to ask itself whether from the affidavit evidence before the Court, it is satisfied that the claim discloses a reasonable cause of action or defence as the case may be.

The Courts of Singapore and Malaysia have considered the operation of O. 92 r. 4 of RHC in a variety of situations - this Order being an overriding provision applicable to all other rules and provisions in the RHC.

See *United Overseas Bank Ltd v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ 85; *Re ABZ (An Infant)* [1992] 2 SLR 442; *Bright Navigation Co. Ltd. v. 'Eishen Maru'* [1988] 1 MLJ 482; *Uni-Navigation Pte. Ltd. v. Wei Loong Shipping Pte. Ltd.* [1993] 1 SLR 876; *Re Singapore Souvenir Industry Ptd. Ltd.* [1986] 1 MLJ 14; *Loo Chay Meng v. Ong Cheng Hoe* [1990] 1 MLJ 445, at pp. 446-447; *Hongkong and Shanghai Banking Corp. v. Goh Su Liat; TAS of Singapore* [1986] 2 MLJ 86; *Low Fong Mei v. Koh Teck Siang* [1989] 3 MLJ 149; *Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd.* [1992] 2 MLJ 434; *Khaw Kok Sin v. Khaw Gim Leong Co. Sdn. Bhd.* [1974] MLJ 180; *Pacific Centre Sdn. Bhd. v. United Engineers (M'sia) Bhd.* [1984] 2 MLJ 143; *Motor Emporium v. Arumugam* [1933] 2 MLJ 276.

As many of the rules are framed to prevent injustice in particular situations, the Court may exercise its inherent powers concurrently or in the alternative. For example, apart from the specific grounds in the rules on which a Court may order the endorsement on a writ or a pleading to be struck out under O. 18, r. 19 of RHC, the Court may so order on the basis of its inherent powers.

Again, the application of O. 79 r. 4 of the SCR - a provision similar to O. 92 r. 4 of our RHC which clearly also governs *inter alia,* O. 14 and O. 18 r. 19(1)(a) as well as (b), (c) and (d) applications - was considered in the Singapore case of *Heng Joo See v. Ho Poi Ling* (Divorce Petition No. 94 of 1993) wherein Coomaraswamy J. restated with approval the definition put forward by Sir Jack Jacob, the former Senior Master of the Supreme Court in his article, '**The inherent jurisdiction of the Court**' [1970] CLP 23 at p. 51 which reads as follows:

> ..the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

A further authority for this inherent jurisdiction is found in the case of *Re Vernazza* [1959] 1 WLR 622; [1959] 2 All ER 200, wherein Lord Parker CJ held that in considering whether any proceedings were vexatious one was entitled to, and ought to, look at the whole history of the matter, and **it was not determined by whether the pleading disclosed a cause of action.** That indeed was the principle applied under the Rules of Court when application was made to strike out a pleading. And that though the pleading might be in order, the Court, in its inherent jurisdiction, was entitled to look at affidavits as to the history of the matter, and if, in the light of that history, the action was vexatious, the pleading could be struck out and the action dismissed. This decision was affirmed by the Court of Appeal, [1960] 2 WLR 135; [1960]1 All ER 183.

Be it noted that even the Privy Council decision in *Tractors Malaysia Berhad v. Tio Chee Hing* [1975] 2 MLJ p. 1 does not preclude the Court from examination of affidavit evidence, as their Lordships in that panel only said that they would be loth (disinclined rather than precluded) to defer from the opinion of the Federal Court (as it then was) had the matter depended upon the contents of the statement of claim alone (i.e. an application under O. 18 r. 19(1)(a)). But in no uncertain terms, the decision enjoins the Court to submit affidavit evidence to critical examination to determine whether the action (or defence) could not possibly succeed.

Lord Diplock in delivering the judgment of the Board had this to say:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the statement of claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the statement of claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. **In refusing to submit the evidence to critical examination, however, the Federal Court erred in law.** This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the New Action could not possibly succeed.

I recognise that a trial on affidavits would be clearly wrong. See *Pertama Malaysia Finance Berhad v. Konrep Services Sdn. Bhd. & 3 Ors.* [1990] 1 CLJ 127. But in applications under O. 18 r. 19 or O. 14, it is still incumbent upon the Court to determine whether issues could appropriately have been decided, without expense of a full trial with witnesses and expenditure of the Courts' invaluable time. No party in a proceeding is entitled to require the Court to accord them valuable time of several days open Court *viva voce* trial only upon mere or bare assertions in their affidavits. Though nevertheless it is essential that affidavits in such aplications filed should be confined to matters pleaded and not go beyond *prima facie* evidence of such matters pleaded

The crucial question the Court would have to ask itself in applications under O. 14 or O. 18 r. 19(1)(a) to (d) is:

> firstly, whether the piece or pieces of evidence essential to make out a reasonable *prima facie* cause of action or a *prima facie* triable issue of fact are of the nature such that they are adduceable by affidavit evidence; and
> secondly - if the answer to this question is in the positive - whether such essential *prima facie* evidence had been so adduced in the supporting affidavits.

Such affidavits ought not to contain bare averments but must condescend or come definitely into particulars for serious argument such that they are sufficient to satisfy the Court that there is a reasonable *prima facie* cause of action or a triable issue or issues of fact or law in the defence as the case may be.

In essence, *prima facie* evidence which are capable of being adduced by affidavit evidence ought to be so adduced even in summary proceedings. And due to the probable finality of the decision in such applications and in order to better consider the issues, an application before the hearing by the respondent for a short adjournment to file a supplementary affidavit should normally be allowed in the interests of justice.

Thus, O. 18 proceedings whether they be under r. 19(a), (b) or (c) - and for that matter also O. 14 proceedings as well - are not decided by weighing mere assertions in the affidavits of both the parties. It is trite that the mere assertion in an affidavit of a given situation which is to be the basis of a claim or a defence, does not *ipso facto* provide immunity against the claim or defence from being struck out under r. 19(a), (b) or (c), (or leave to defend refused in an O. 14 matter); the court must and ought to look at the whole situation and ask itself whether the plaintiff (in an application to strike off claim) has satisfied the Court that he has a *bona fide* or *prima facie* cause of action, and the defendant (in an application to strike off defence) has not only raised an issue but **also** that the issue is, *prima facie*, triable. The defendant has to make out a good *prima facie* defence only if the plaintiff's case is also *prima facie* a good one. See *Saw v. Hakim* [1888] 5 TLR 72.

It is this Court's view that due to the current position of our Courts, being choked up, hobbled, bridled and hamstrung with an ever increasing backlog of cases, no less contributed by the many frivolous claims (for unwarranted gain or advantage) and sham defences (designed for delay purposes), a fresh approach more in keeping with the times should be adopted when considering applications under O. 14 and O. 18 r. 19 of the RHC. The minimum evaluation approach in the past, of affidavit evidence when deciding the issue of whether there is a reasonable cause of action in the claim, or triabal issue in a defence, would have to give way to the optimum evaluation approach. I say optimum and not maximum no doubt because

of the probative limitations attendant upon such summary procedure applications.

A time will come soon if not now when willy-nilly the Court may have to adopt the optimum evaluation approach on summary application proceeding so as to confront the problem of baseless claims or defences head-on. It cannot be accused of doing hurried justice when public policy and administration of justice would not condone an abuse of process of the Court and the Court is clearly cloathed with inherent jurisdiction under O. 92 r. 4 to prevent such abuse. In this fresh approach it is also envisaged that, in appropriate case, O. 33 r. 2, O. 14, O. 34 r. 8 and O. 28 r. 4 (see *Chang Siew @ Chang Siew Kee & Ors v. Chang Sang @ Chen Yen Sang & Anor.* [1993] 1 CLJ 125), besides O. 18 r. 19 discussed above, would increasingly be employed by parties and Courts for expeditious disposal of cases.

Though not relevant to our current case, but nevertheless, as the same principles governing to O. 18 r. 19(1) applications are also applicable to O. 14 matters, it may be appropriate here (for completeness) to remind ourselves the object of O. 14 proceedings in the words of Halsbury L.C. in *Jacobs v Booth's Distillery Co.* [1901] 85 LT 262, H.L. who had this to say:

> People do not seem to understand that the effect of O.14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a Court; that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

In our current case, there should be sufficient evidence in the affidavits read in conjunction with the statement of claim of the plaintiff to show that the latter is at least cloathed with a reasonable *prima facie* cause of action against the defendant. Such *prima facie* evidence, in this case, the plaintiff had failed to disclose in any of her affidavits filed herein. Besides the fact that neither she nor her granduncle had paid any licence fee nor had either of them held any licence to occupy structure No. 866 or any other building thereabouts, she did not produce even an iota of evidence to support her claim to equitable interest. There was no independent evidence - affidavit or otherwise, besides her bare averments - on the expenditure she claimed her granduncle had incurred in erecting structure no. 866 or the consent to occupy allegedly received by her granduncle from the then landowner. On the balance of probability she had also failed to show on a *prima facie* basis why structure no. 866 should not be considered part of the house No. 107, which was occupied by her husband under licence no. D3/41, in view of the close juxtaposition of the two structures. In this case, such *prima facie* evidence is eminently adduceable and ought to be adduced at this stage by affidavit evidence, if the Court is to carry out an optimum evaluation to determine whether there was a reasonable cause of action.

Furthermore, the winds have been taken away from the sails of the plaintiff's contention that premises no. TI 866 should be treated as separate from house no.107 due to separate assessment being paid, as I accept the defendant Counsel's rebuttal, that under the Local Government Act 1976 every structure or buildlng has to be assessed and the fact that assessment was paid on TI 866 does not *ipso facto* signify that same should not be considered an appurtenance of house no. 107.

I agree that if we were proceeding upon the suggestion that the pleadings do not disclose a cause of action, the improbability of the alleged facts would not be material, but when we are inquiring whether there are any reasonable grounds on which the plaintiff can expect to succeed, I think that we are not only at liberty, but bound, to look at the probability or improbability of the story upon which the plaintiff relies. I have before me her story, which is a very extraordinary and very improbable, although possible, story. Anything more shadowy, anything more unlikely to produce persuasion or conviction on the mind of the Court from the affidavit filed to inform the conscience of the Court as to the truth of the plaintiff's story I can scarcely imagine.

Those affidavits, not only by what they do say but by what they do not say, confirm my conclusion that the plaintiff has no reasonable ground for proceeding with this action. It was an abuse of the procedure, as the claim is

incapable of proof and without firm basis; it was a despicable attempt by the wife to secure double compensation on what her husband was to receive from the defendant. I had therefore, on 2 February 1994 made an order in terms of enclosure that the claim herein be struck out with costs.

Learned Counsel for the plaintiff applied orally for adjournment of the matter into open Court for further argument under s. 68(2) of Courts of Judicature Act 1964 (O. 56 r. 2(2) has been repealed). I declined as the issues have been exhaustively canvassed before me in chambers.

The Counsel then applied for a stay - of my said order in terms of Enclosure 8 - pending an appeal to the Supreme Court. This was also refused as it is settled that an application for stay on the sole ground that if the structure is demolished, any appeal to the Supreme Court even if successful would be rendered nugatory, is by itself insufficient for this Court to exercise its descretion in the plaintiff's favour. The plaintiff would also have to satisfy this Court that she has arguable grounds of appeal. This was nowhere disclosed in the argument and the affidavits before me.

The last application for leave to the Supreme Court was also turned down as there are no new points of law involved herein - this being merely the case of a plaintiff who has attempted to raise the right to equitable interest by bare allegation - and I am of the opinion that the Supreme Court should also not be clogged with such baseless appeals. I had however indicated that I would write my grounds immediately.

**TAN LEE HONG**

**v.**

**LETCHMEE D/O VARATHEN (AS REPRESENTATIVE OF THE ESTATE OF VARATHEN S/O GOVINDAN, DECEASED)**

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[CIVIL APPEAL NO. 12-71-93]
12 NOVEMBER 1993

***PRACTICE & PROCEDURE: Appeal from subordinate Court to High Court - Failure to lodge security for the costs of the appeal within the time limited - Application for enlargement of time to lodge security - Application filed in the High Court - Whether proper - Order 49 rule 2(5) Subordinate Courts Rules 1980 - Whether High Court has jurisdiction and power to hear the application - Whether s. 25(2) of Courts of Judicature Act 1964 applicable - Whether appellant should be given leave to appeal to Supreme Court.***

The appellant appealed to the High Court against the decision of the Sessions Court. On receipt of the Form 141 notice the appellant paid the costs of preparation of the notes of evidence and the grounds of decision. The appellant failed to lodge the security for the costs of the appeal in the Sessions Court within the time limited and the Court treated the appeal as being abandoned.

The appellant applied to the High Court for enlargement of time to pay the security for the costs of the appeal which application was dismissed. The appellant's contention was that the High Court could enlarge the time pursuant to its powers under s. 25(2) of the Courts of Judicature Act 1964 (the Act). The appellant then applied for leave to appeal to the Supreme Court.

**Held:**

**[1]** The High Court lacks the power and the jurisdiction to hear the enlargement of time application. Order 49 rule 2(5)(b) of the Subordinate Courts Rules 1980 (SCR 1980) specifically provides for such an application to be made to the Court appealed from. Should the High Court hear the application it would be arrogating to itself a power and jurisdiction which is not conferred upon it by law.

**[2]** Article 121 of the Federal Constitution as amended by Act A704 stipulates that the High